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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Follow-up to the day of general discussion on article 15.1 (c), Monday, 26 November 2001

Human rights and intellectual property

Statement by the Committee on Economic Social and Cultural Rights

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Introduction

1. The Committee on Economic, Social and Cultural Rights recognizes the broad significance of the creation, ownership and control of intellectual property in a knowledge-based economy and the means that it can afford for promoting or inhibiting the enjoyment of human rights, in particular the rights under the International Covenant on Economic, Social and Cultural Rights. The allocation of rights over intellectual property has significant economic, social and cultural consequences that can affect the enjoyment of human rights. The contemporary importance of intellectual property for human rights reflects two developments. The first is the expansion of the areas covered by intellectual property regimes to include, for example, patenting of biological entities, copyright print protections in the digital domain, and private intellectual property claims with respect to cultural heritage and traditional knowledge. The second is the emergence of universal rules on intellectual property protection in the global trading system.

2. The Committee has resolved to prepare and adopt, as soon as possible, a general comment on intellectual property and human rights. The Committee, however, has decided to adopt this statement as its preliminary contribution to the rapidly evolving debate on intellectual property, which remains high on the international agenda. The statement aims only to identify some of the key human rights principles deriving from the Covenant that are required to be taken into account in the development, interpretation and implementation of contemporary intellectual property regimes. These basic principles will be further refined, elaborated and applied in the Committee's forthcoming general comment on intellectual property and human rights.[1]

3. The principles set out in the present statement apply equally to national legislation and international rules and policies concerning intellectual property protection. In particular, the Committee draws attention to the various intellectual property treaties administered by the World Intellectual Property Organization (WIPO), as well as the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) of the World Trade Organization (WTO), which set out minimum standards for the protection and enforcement of intellectual property rights. Reference could also be made to relevant articles of other treaties, such as the 1992 Convention on Biological Diversity. In this regard, the Committee recalls previous statements it has made in which it emphasized that the realms of trade, finance and investment are in no way exempt from human rights principles and that "international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights."[2]

4. Article 15.1 (c) of the Covenant, together with article 27 of the Universal Declaration on Human Rights, requires the protection of the moral and material interests of authors in their works. The Committee considers that these intellectual property rights must be balanced with the right to take part in cultural life [3] and to enjoy the benefits of scientific progress and its applications.[4] Moreover, article 15.2 of the Covenant requires that States parties undertake steps necessary for the conservation, development and diffusion of science and culture. To be consistent with a human rights-based approach, intellectual property regimes should be conducive to realizing these goals. The Committee therefore encourages the development of intellectual property systems and the use of intellectual property rights in a balanced manner that meets the objective of providing protection for the moral and material interests of authors, and at

the same time promotes the enjoyment of these and other human rights. Ultimately, intellectual property is a social product and has a social function. The end which intellectual property protection should serve is the objective of human well-being, to which international human rights instruments give legal expression.

Universality, indivisibility and interdependence of human rights

5. Human rights derive from the inherent dignity and worth of all persons, with the human person as the central subject and primary beneficiary of human rights.[5] The moral and legal guarantees of fundamental freedoms, protections and entitlements both derive from and support people's self-respect and dignity. Consequently, the entire range of civil, cultural, economic, political and social rights, as well as the right to development, are relevant to intellectual property systems. To be consistent with obligations to respect international human rights, intellectual property regimes must promote and protect all human rights, including the full range of rights guaranteed in the Covenant.

6. The fact that the human person is the central subject and primary beneficiary of human rights distinguishes human rights, including the right of authors to the moral and material interests in their works, from legal rights recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities. Human rights are fundamental as they derive from the human person as such, whereas intellectual property rights derived from intellectual property systems are instrumental, in that they are a means by which States seek to provide incentives for inventiveness and creativity from which society benefits. In contrast with human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.[6] While intellectual property rights may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for under article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements.

Equality and non-discrimination

7. Human rights are based on the equality of all persons and their equal standing before the law. For that reason, human rights instruments place great emphasis on protection against discrimination. Articles 2.2 and 3 of the Covenant stipulate that States parties undertake to guarantee that the rights enunciated in the Covenant must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and to ensure the equal rights of men and women to the enjoyment of all the rights set forth in the Covenant.

8. A human rights-based approach focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities. Because a human right is a universal entitlement, its implementation is evaluated particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and marginalized and brings them up to the mainstream level of protection. Thus, in adopting intellectual property regimes, States and other actors must give particular attention at the national and international levels to the adequate protection of the human rights of disadvantaged and marginalized individuals and groups, such as indigenous peoples.[7]

Participation

9. International human rights law includes the right of everyone to be consulted and participate in significant decision-making processes that affect them. The right to participate is reflected in numerous international instruments, including the Covenant[8] and the International Covenant on Civil and Political Rights,[9] as well as the Declaration on the Right to Development.[10] Accordingly, the Committee supports the active and informed participation of all those affected by intellectual property regimes.

Accountability

10. The Committee reiterates its position set out in its statement on poverty, "rights and obligations demand accountability: unless supported by a system of accountability, they can become no more than window-dressing."[11] While the State holds the primary duty to respect, protect and fulfil human rights, other actors, including non-State actors and international organizations, carry obligations, which must be subject to scrutiny. Accordingly, the adequate protection of human rights needs accessible, transparent and effective accountability mechanisms to ensure that rights are respected, and where they are not, that victims can find redress. A human rights approach to intellectual property requires that all actors are held to account for their obligations under international human rights law, specifically with regard to the adoption, interpretation and implementation of intellectual property systems.

General legal obligations

11. In the context of intellectual property, it should be noted that while the Covenant provides for progressive realization and acknowledges the constraints due to limits on available resources, it also imposes on States parties various obligations which have immediate effect, including core obligations.[12] Progressive realization over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of all the rights enshrined in the Covenant. Accordingly, the Committee wishes to emphasize that national and international intellectual property regimes must be consistent with the obligation of States parties to ensure the progressive realization of full enjoyment of all the rights in the Covenant. Furthermore, all parties are urged to ensure that intellectual property regimes contribute, in a practical and substantive way, to the full realization of all the Covenant rights.

Core obligations

12. In this regard, it should also be recalled that the Committee's General Comment No. 3, adopted in 1990, confirms that States parties have a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" enunciated in the Covenant. As the Committee observes, without such a core obligation, the Covenant "would be largely deprived of its raison d'être".[13] More recently, the Committee has begun to identify the core obligations arising from the "minimum essential levels in relation to the rights to health, food and education".[14] The Committee wishes to emphasize that any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party.

International cooperation and assistance

13. As the Committee confirmed in its General Comment No. 14 on the right to health, it is particularly incumbent on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical", in order to enable developing countries to fulfil their core obligations under the Covenant.[15] Accordingly, it is incumbent upon developed States, and other actors in a position to assist, to develop international intellectual property regimes that enable developing States to fulfil at least their core obligations to individuals and groups within their jurisdictions. In this regard and so as to avoid repetition, the Committee reaffirms paragraphs 15 to 18 of its statement on poverty.[16]

14. The Charter of the United Nations commits all nations to the development of an equitable and just international order that encourages peace, solidarity, social progress and better standards of life for all nations large and small. Article 28 of the Universal Declaration of Human Rights declares that everyone has the right to a social and international order in which the rights and freedoms in the Declaration can be enjoyed. Articles 2.1 and 23 of the Covenant further state that States parties should engage in international cooperation in order to achieve progressively the rights enshrined in the Covenant. Article 15.4 of the Covenant further recognizes the benefits to be derived from encouraging and developing international contacts and cooperation in the scientific and cultural fields.[17]

15. The Committee observes that countries enjoy different levels of development, resulting in different technological needs. While some countries might focus on the protection of technology, others may focus more on facilitating access. It is essential that intellectual property regimes facilitate and promote development cooperation, technology transfer and scientific and cultural collaboration. International rules concerning intellectual property should not necessarily be uniform if this might lead to forms of intellectual property protection inappropriate for development goals. The Committee encourages the adoption and implementation of effective international mechanisms for special and differential treatment for developing countries concerning intellectual property protection.

Self-determination

16. Article 1.2 of the Covenant states that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation ... ". National sovereignty over wealth and resources is an important prerequisite for the effective promotion and protection of human rights. In negotiating, and adhering to, international treaties on intellectual property, States should consider how this will affect their sovereignty over wealth and resources and ultimately their capacity to ensure the rights enshrined in the Covenant.

Balance

17. Article 15 of the Covenant sets out the need to balance the protection of public and private interests in knowledge. On the one hand, article 15.1 (a) and (b) recognizes the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. On the other hand, article 15.1 (c) recognizes the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. When adopting and reviewing intellectual property systems, States should bear in mind the need to strike a balance between those concurrent Covenant provisions. In an effort to provide incentives for creation and innovation, private interests should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration. The Committee notes that an example of this need to strike a balance can be found in the recent Declaration on the TRIPS Agreement and Public Health, which recognizes that intellectual property protection is important for the development of new medicines, but at the same time also recognizes the concerns about its effect on prices.[18]

Conclusion

18. The Committee considers of fundamental importance the integration of international human rights norms into the enactment and interpretation of intellectual property law. Consequently, States parties should guarantee the social dimensions of intellectual property, in accordance with international human rights obligations to which they have committed themselves. An explicit commitment to do so and the establishment of a mechanism for a human rights review of intellectual property systems are important steps towards that goal.

19. There is a similar need for intergovernmental organizations to integrate international human rights obligations and principles into their policies, practices and operations. Conscious of the far-reaching importance and complexity of integrating human rights into the development of intellectual property regimes, the Committee confirms its willingness to discuss the issues identified in this statement with relevant actors and its availability to assist States parties and intergovernmental organizations in this process.

Notes

[1] On 27 November 2000, the Committee held a day of general discussion on article 15.1 (c) of the Covenant, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author, which formed a basis for the Committee's drafting of a general comment.

[2] Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, 26 November 1999 (E/C.12/1999/9).

[3] Article 15.1 (a) of the Covenant.

[4] Article 15.1 (b) of the Covenant.

[5] See e.g. the Preambles to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. See also article 5 of the 1993 Vienna Declaration and Programme of Action.

[6] Report of the High Commissioner on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, E/CN.4/Sub.2/2001/13, 27 June 2001, paragraph 14.

[7] Statement by the Committee on Economic, Social and Cultural Rights on "Poverty and the International Covenant on Economic, Social and Cultural Rights", E/C.12/2001/10, 4 May 2001, paragraph 11.

[8] Article 25.

[9] Article 13.1.

[10] Article 2.3.

[11] See note 7, paragraph 14.

[12] See, for example, the Committee's General Comments No. 3 (on the nature of States parties' obligations, article 2.1 of the Covenant) and 9 (the domestic application of the Covenant), No. 13 (on the right to education, paras. 43-44) and No. 14 (on the right to health, paras. 30-32), in HRI/GEN/1/Rev.5, 26 April 2001.

[13] General Comment No. 3, paragraph 10, see note 12.

[14] General Comments Nos. 11, 13 and 14, see note 12.

[15] General Comment No. 14, paragraph 45, see note 12.

[16] See note 7.

[17] The Covenant refers to "international assistance and cooperation", or similar formulations, in articles 2.1, 11.2, 15.4, 22 and 23.

[18] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, Ministerial Conference, Fourth Session, Doha, Qatar, adopted on 14 November 2001, WT/MIN(01)/DEC/2, paragraph 3.

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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

Statement of the Committee on Economic, Social and Cultural Rights to the International Consultative Conference on School Education in Relation to Freedom of Religion and Belief, Tolerance and Non-Discrimination, Madrid, 23-25 November 2001

Adopted on 12 November 2001

1. The Committee on Economic, Social and Cultural Rights has the pleasure of submitting the present statement to the International Consultative Conference on School Education in Relation to Freedom of Religion and Belief, Tolerance and Non-Discrimination, being held in Madrid from 23 to 25 November 2001.

2. In compliance with requests by the United Nations General Assembly and the Commission on Human Rights, the Committee actively contributed to the preparatory process leading up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and made recommendations concerning the draft declaration and programme of action.

3. The Committee's contributions to the World Conference against Racism consisted of two general comments relating to the right to education, namely General Comment No. 11 on

plans of action on the right to education enshrined in article 14 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/1999/4) and General Comment No. 13 on the right to education as set forth in article 13 of the Covenant (E/C.12/1999/10).

4. In its submission to the first session of the Preparatory Committee for the World Conference, the Committee focused on the right to education as set forth in articles 13 and 14 of the Covenant, as it is universally recognized that education has a pivotal role to play in the struggle against racism and related intolerance (A/CONF.189/PC.1/14, para. 3). This position has also been taken by the General Assembly (in resolution 53/132 of 9 December 1998), the Commission on Human Rights (in a report of its working group to review and formulate proposals for the World Conference) and by the Committee on the Elimination of Racial Discrimination.

5. The Committee invites the attention of the Madrid Conference to those sections of article 13 of the Covenant and its General Comment No. 13 which explicitly bear upon racism and racial discrimination and as set forth in its submission to the preparatory process of the World Conference:

(a) Article 13, paragraph 1, setting out the aims and objectives of education, declares that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms". Further, "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups";

(b) "The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination." (General Comment No. 13, para. 31);

(c) "The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved." (General Comment No. 13, para. 32);

(d) "States parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination." (General Comment No. 13, para. 37);

(e) "[T]he form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents ... subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State." (General Comment No. 13, para. 6 (c));

(f) "[E]ducation has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings." (General Comment No. 13, para. 6 (d));

(g) Paragraph 9 of General Comment No. 13 quotes with approval from the World Declaration on Education for All (Jomtien, Thailand, 1990): "Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community."

(h) "The requirement [in article 13 (2)] that 'an adequate fellowship system shall be established' [under article 13 (2)] should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups." (General Comment No. 13, para. 26);

(i) "Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty [to establish private educational institutions] does not lead to extreme disparities of educational opportunity for some groups in society." (General Comment No. 13, para. 30.)

6. In conclusion, the Committee reaffirms the opening words of its General Comment No. 13: "Education is both a human right in itself and indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities". Education is one of the most powerful tools by which the world can overcome racism, racial discrimination, xenophobia and related intolerance. Thus, an essential strategy for the elimination of discrimination is a renewed commitment, supported by the necessary resources, to realize the right to education as enshrined in the International Covenant on Economic, Social and Cultural Rights.